

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Solid Waste Field
Citation Issued to Thomas J.
Lakoskey.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis on July 8, 1997 and September 5, 1997 in Duluth and Minneapolis, respectively. The record in this matter closed on September 5, 1997.

Ann E. Cohen, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared on behalf of the Minnesota Pollution Control Agency (MPCA). There was no appearance by or on behalf of Thomas J. Lakoskey (Respondent) at either site. Testimony was taken from the Agency's witness at Duluth on July 8. On September 5, Counsel for the MPCA made an oral request for Finding(s) by the Administrative Law Judge that the hearing request was frivolous or made solely for the purposes of delay, such that it would be proper to add to the penalty the costs charged to the Agency by the Office of Administrative Hearings, in accordance with Minn. Stat. § 116.072, subd. 6 (d).

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 116.072, subd. 6 (e) the final decision of the Commissioner of the Pollution Control Agency shall not be made until this Report has been made available to the parties to the proceeding for at least five (5) days, and an opportunity has been afforded to each party adversely affected to comment on the Recommendation. The Commissioner must consider such comments before issuing his final decision. Comments on this Report, if any, shall be filed with Peder A. Larson, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, MN 55155.

STATEMENT OF ISSUES

Whether Thomas J. Lakoskey, by reason of his failure to appear at the hearings in this matter, is in default; and

Whether it is appropriate to affirm the Solid Waste Field Citation issued to Mr. Lakoskey on April 8, 1997, and the penalty amount of \$1,440 imposed in that Citation; and

Whether the hearing request by Mr. Lakoskey was frivolous or was made solely for purposes of delay, such that it would be proper to add to the

penalty the costs charged to the Agency by the Office of Administrative Hearings for the hearing.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

On April 8, 1997, Conservation Officer Douglas Erickson of the Minnesota Department of Natural Resources (DNR) served personally a Notice of Solid Waste Disposal Violation, Civil Citation and Imposition of Penalty to Thomas J. Lakoskey. The Citation was based on Mr. Lakoskey's improper disposal (failure to remove) of a fish house from the frozen surface of Lake Vermillion near the City of Tower in St. Louis County. The statutory deadline for removal of fish houses on the lake was March 15, 1997. See Minn. Stat. § 97C.355, subd. 7 (a) (2).

Erickson had agreed with Lakoskey to extend the deadline for removing the fish house because the lake's surface had turned to slush in the warm weather, making removal difficult. Lakoskey agreed originally to remove the material by March 26.

On March 26, 1997, Erickson was standing on the shore of Lake Vermillion at Tower and observed, through binoculars, a person resembling Thomas Lakoskey (with whom Erickson was acquainted before these events transpired) cutting up the wooden-structured fish house with a chain saw. The person then put certain possessions from the fish house on a snowmobile and drove away without removing any of the wood that had constituted the shell of the structure.

Officer Erickson was informed subsequently by Lakoskey's uncle that the Respondent quit the removal attempt on March 26 because he got wet and cold. Erickson accepted that excuse and extended the deadline through the weekend of March 29-30. Lakoskey left a voice mail message for Erickson to thank him for the four day extension, adding that he would "remove it soon." None of the material left behind on March 26 had been removed as of April 5, on which day Erickson talked to Lakoskey's wife, and told her to "tell Tom to get it off this weekend".

The wooden remains of the fish house structure remained on the lake surface until April 8, 1997, a day on which the lake's surface had ice thick enough to support heavy motor vehicles and the ice surface was smooth enough for transportation. Weekend (April 5-6) weather and ice surface conditions had also been conducive to removing debris from the lake. After observing the wood remains still in place Erickson called on the Respondent in person at his apartment in Virginia at approximately 2:00 p.m. and gave him one last chance to "remove it or you'll have to pay the fine". He mentioned that dump trucks were carrying loads of gravel on the ice surface under current conditions, so conditions were fine for removal of the fish house. Lakoskey became belligerent and said "I'll just have to pay the fine". Erickson served Lakoskey with

the Citation, and told him to dispose of the property (under Erickson's supervision) properly by noon on April 12, 1997 or he could be "recharged with the same offense." Erickson also told the Respondent that if he "wanted to negotiate" the amount of the fine, he would have to remove the fish house and "negotiate through me". Lakoskey's last statement before Erickson left the apartment was "I can't remove it, so I will just have to pay the fine."

On April 9, 1997 Erickson found parts of Lakoskey's fish house scattered on the lake surface, concluded from his observations that Lakoskey had no intention of trying again to remove the debris, and determined to have the job done himself.

On April 10, 1997, Erickson and three employees of the DNR's Trails and Waterways Division removed the fish house remains from the lake surface and transported the material by truck to the boat landing at McKinley Park Campground in Tower. Lakoskey did not appear to dispose of the wood on April 12. The wood was still at the landing site on April 14, 1997, when Erickson caused it to be taken away and disposed of at a landfill by a commercial solid waste disposal contractor at a cost of \$173. The remains taken away (which included wood, glass, pots and pans, folding chairs, carpet remains and other assorted rubbish) were at least 72 cubic feet in volume. The penalty of \$1,440 was calculated by multiplying the cubic footage by \$20, the fine imposed under Minn. Stat. § 116.073, subd. 2 for every cubic foot of solid waste disposed of at a location not authorized by law (such as the frozen surface of Lake Vermillion).

Mr. Lakoskey appealed from the Citation issued on April 8, 1997 by letter received at the MPCA on April 22, 1997. The appeal letter indicated an address at 110 Anderson Drive, Apartment #12, Virginia, MN 55792 for Mr. Lakoskey. On May 21, 1997, Counsel for the Agency informed the Respondent in writing that, while Minn. Stat. § 116.072, subd. 6 provided for a hearing within 30 days of a request for one, she was informed by the Office of Administrative Hearings that the first available date for a hearing on its calendar was July 1, 1997. The letter reads, in part:

"If you have no objection to convening the hearing at the offices of the Minnesota Pollution Control Agency in St. Paul on [July 1, 1997], please so indicate by signing this letter and returning it to me in the envelope provided. When I receive your response (or in the event that I receive no response within a reasonable period of time) I will arrange for the issuance of a Notice of and Order for Hearing specifying that date and location. If you object to the date or location, please contact me at the number that appears below."

No objection to the proposed hearing date or location was received.

On June 9, 1997, the Agency issued a Notice of and Order for Hearing, setting the hearing for July 1, 1997 in St. Paul. On or about June 19, Mr. Lakoskey contacted Counsel for the Agency and requested a location closer to his home and a later date for the hearing so he could organize his witnesses

and better assure their attendance. Counsel informed the Administrative Law Judge of Lakoskey's request, and the ALJ issued a Letter-Order on June 27, 1997, continuing the hearing until 11:00 a.m. on July 8, 1997 in Duluth. The ALJ also informed Mr. Lakoskey's wife of the new date, time and place by telephone on June 27, 1997.

On July 8, 1997, the ALJ convened the hearing at 11:40 a.m., after leaving a voice mail telephone message at the number at which he earlier had talked to Mrs. Lakoskey. With the agreement of Counsel, testimony was taken from the Agency's witness, Conservation Officer Douglas Erickson. There was no appearance by or on behalf of Thomas J. Lakoskey.

The Administrative Law Judge presided at another contested case hearing in northern Minnesota on July 9, 1997 and returned to the Office of Administrative Hearings in Minneapolis on July 10. At that time, he read an electronic mail message that one Carol Spelts of Biwabik, Minnesota, had called the afternoon of July 8. The caller had identified herself as Lakoskey's mother and left a message that there had been a mix-up on the dates. The ALJ returned the call and was informed by a person identifying herself as Carol Buchanan Spelts that Thomas Lakoskey had moved out of his wife's apartment and was now living with her (Buchanan Spelts) in Biwabik. She alleged her son had moved away from the Virginia address prior to the ALJ's June 27 call to Angela Lakoskey (the Respondent's wife), and that neither she nor her son had ever seen the Judge's Letter-Order of June 27. Based on this information, the ALJ sent a letter to both parties on July 11, 1997 (the mailing address for Buchanan Spelts and Mr. Lakoskey is P.O. Box 411, Biwabik, MN 55708) allowing Ms. Buchanan Spelts and/or the Respondent time to file a written explanation of why no appearance was made in Duluth and to submit a short (non-evidentiary) summary on the merits of the case.

Ms. Buchanan Spelts and Mr. Lakoskey responded by FAX on July 15, 1997 to the letter noted in the preceding Finding. As to reasons for not appearing in Duluth, the letter repeated Ms. Buchanan Spelts's oral statement to the Judge as summarized in Finding #11, and added that Angela Lakoskey had reported orally to her husband that the hearing was to be held in Duluth at 11:00 a.m. on July 14, not July 8. Regarding the merits of the case on appeal, it was alleged that Officer Erickson and Lakoskey agreed to meet at noon on April 12 to remove the fish house remains from the lake, but that Lakoskey canceled those plans (including lining up people to help) after learning on April 10 that the fish house was off the lake. The author of the letter, Ms. Buchanan Spelts, alleged further that in a subsequent telephone conversation she asked Officer Erickson why the fish house had been removed from the lake earlier than planned and why he had not let them know, to which he responded "we were on the lake and just decided to do it at that time."

On August 6, 1997, the Administrative Law Judge issued a Letter-Order that granted a reopening of the hearing to the Respondent on the grounds that he had been misinformed regarding the date of the hearing in Duluth. The hearing was scheduled to reconvene at 1:00 p.m. on September 5,

1997 at the Office of Administrative Hearings in Minneapolis. No one contacted the Administrative Law Judge to object to the time and date set for the reconvened hearing, although the Letter-Order specified that the parties could do so.

On August 8, 1997, Counsel for the MPCA mailed a Request for Disclosure of Witnesses to the Respondent pursuant to Minn. R. 1400.8600. The rule requires compliance with such a request (demand) within ten days of receipt of the demand. As a sanction, the rule requires that any party "unreasonably failing" to make disclosure upon demand shall be foreclosed from presenting evidence at a contested case hearing through undisclosed witnesses. On August 22, 1997, Ms. Cohen filed with the Administrative Law Judge a Motion to Limit Testimony for the Respondent in the reconvened hearing to testimony from Mr. Lakoskey. On August 29, 1997, the ALJ issued a Letter-Order granting Counsel's Motion.

On August 27, 1997, Ms. Buchanan Spelts and Mr. Lakoskey sent a letter to Ms. Cohen disclosing the names and addresses of several persons, in addition to Mr. Lakoskey, whom the Respondent intended to call as witnesses at the reconvened hearing. The letter alleged that the response to Counsel's disclosure request had been delayed until August 27 because Buchanan Spelts and Lakoskey had been on vacation. This letter and the Judge's Letter-Order of August 29, 1997 crossed in the mail.

Late in the morning of September 5, 1997, Ms. Buchanan Spelts called the ALJ and informed him that no one would be appearing at the hearing at 1:00 p.m. because "we can't have any witnesses". The ALJ reminded Ms. Buchanan Spelts that his Order made it clear that Mr. Lakoskey was allowed to testify, that he had the right to be represented at the hearing by counsel or any other person of his choice, and that persons offering him advice and support (such as Ms. Buchanan Spelts) could accompany him. The hearing was reconvened at approximately 1:20 p.m. on September 5, 1997 and continued until approximately 2:00. There was no appearance by or on behalf of the Respondent.

At the reconvened hearing on September 5, 1997, Counsel requested the Administrative Law Judge to issue findings that the hearing was requested solely for the purposes of delay or that the hearing request was frivolous so that, under Minn. Stat. § 116.072, subd. 6 (d), the Commissioner of the Pollution Control Agency (in his discretion) could add to the amount of the penalty the costs charged to the Agency by the Office of Administrative Hearings for the hearing. The Administrative Law Judge took Counsel's request under advisement.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

The Administrative Law Judge and the Commissioner of the Pollution Control Agency have jurisdiction in this case pursuant to Minn. Stat. §§ 14.57 - 14.62 and Minn. Stat. § 116.072.

The Notice of Hearing and Notice of the Reconvened Hearing were both proper, and all relevant substantive and procedural requirements of law or rule have been fulfilled. Therefore, the matter is properly before the Administrative Law Judge.

Any Finding of Fact more properly termed a Conclusion is hereby adopted as such.

Thomas J. Lakoskey, having made no appearance at the initial hearing or at the reconvened hearing in this matter, is in default.

Pursuant to Minn. R. 1400.8560, and due to the Respondent's default in this matter, the allegations in the Notice of Hearing are taken as true and deemed proven without further evidence and it is appropriate to affirm the Notice of Solid Waste Disposal Violation, Civil Citation and Imposition of Penalty issued to the Respondent on April 8, 1997.

Mr. Lakoskey's fish house was demolished on March 26, 1997. The debris left behind became solid waste within the meaning of Minn. Stat. § 116.06, subd. 22.

The Citation on appeal in this matter relates to a penalty only for improper disposal (failure to remove or abandonment) of the solid waste materials that constituted the remains of Thomas Lakoskey's fish house on the surface of Lake Vermillion in St. Louis County, Minnesota. Any additional penalty imposed under Minn. Stat. § 116.073 to reimburse the Department of Natural Resources (which disposed of the waste) or the Minnesota Pollution Control Agency for reasonable costs of removal from the lake surface and proper disposal of the solid waste requires issuance of a separate citation, with notice of the Respondent's right to appeal, and is beyond the jurisdiction of this proceeding.

The Administrative Law Judge declines to make Findings that the hearing request of Thomas J. Lakoskey was frivolous or that the hearing was requested only for purposes of delay. Under such circumstances, the Commissioner of the Pollution Control Agency is without jurisdiction under Minn. Stat. § 116.072, subd. 6 (d) to add to the amount of the penalty (\$1,440) the costs charged to the Agency by the Office of Administrative Hearings for the hearing.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Solid Waste Field Citation issued against Thomas J. Lakoskey on April 8, 1997 be AFFIRMED.

Dated this 3rd day of October, 1997.

/s/

RICHARD C. LUIS
Administrative Law Judge

Reported: Taped.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve the final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

The Administrative Law Judge concludes the Respondent is in default because his failure to appear in Minneapolis on September 5, 1997 was not justified. The excuse offered by Ms. Buchanan Spelts, that Lakoskey was not allowed to have witnesses, ignores the clear language of the Judge's August 29, 1997 Order which specified that Lakoskey could still testify on his own behalf, and bring anyone else for support and advice, including an attorney.

As noted in the Findings, the Order limiting the witnesses to Mr. Lakoskey was issued before an attempt at compliance (witness list) was received. Lakoskey failed to contact the Administrative Law Judge in an attempt to obtain a rescission of the August 29, 1997 Order. The ALJ may have allowed the Respondent to argue that his filing of a witness list was late because he was on vacation and did not receive Counsel's Request for Disclosure of Witnesses of August 8 or her Motion to Limit Testimony of August 22 until sometime shortly before filing the list. Such an argument could have been made prior to September 5 or at the start of the reconvened hearing, but the Respondent waived those opportunities. It is not the responsibility of the Administrative Law Judge to suggest to Mr. Lakoskey that he make those arguments or to offer gratuitously to extend him the opportunity. Parties to contested cases, regardless of their choice to be represented by counsel or not, are responsible for taking the initiative to pursue the procedural aspects of such cases.

It is noted that the merits of Mr. Lakoskey's case, had it ever been presented in an evidentiary hearing, reduce themselves to differing versions of what Lakoskey reasonably should have believed regarding a deadline for removal of the fish house's material remains. The only witnesses truly necessary to decide what Erickson and Lakoskey said to each other are those two men. Any other witnesses for Lakoskey would have been cumulative and/or corroborative, but not essential. It is clear and undisputed that Lakoskey knew or should have known at all times since issuance of the initial Notice of Hearing that

he would be allowed to testify. Given that, and the fact he is the only witness essential to his case, a conclusion that he is in default is appropriate.

Regarding whether the hearing request was frivolous or the hearing was requested solely for purposes of delay, the ALJ has concluded to the contrary for both propositions. The theory of Lakoskey's case, as presented in the July 15 FAX to the Administrative Law Judge, is that he was told (or had a reasonable basis to believe) that if he showed up at the lake shore at noon on April 12 to remove and dispose of the fish house, that there would be no penalties. This is a plausible argument, given Erickson's testimony that extensions beyond the March 15 deadline had already been granted and his admission that he told Lakoskey during some point in their conversation on April 8 that he (Lakoskey) had a choice to remove the fish house or pay the fine. Looking at these facts in a light most favorable to the non-moving party, it is reasoned that a genuine factual dispute existed regarding the appropriateness of the Citation, especially if Lakoskey could have established that he was prepared to remove and dispose of the fish house properly on April 12, but that Erickson "jumped the gun" and did it on April 10.

The fact that Lakoskey defaulted does not mean automatically that his case had no merit. The Administrative Law Judge is unable to conclude that the hearing was requested to effect a delay in paying the penalty or that the appeal, which would have come down to a "credibility contest" had the matter been tried, was frivolous.

The Judge is persuaded that it is plausible that Mr. Lakoskey believed (incorrectly) that he could have no witnesses at the September 5 hearing, despite the language to the contrary in the August 29 Order. The fact that he and/or his representative (Ms. Buchanan Spelts) waited until 90 minutes before the hearing was due to reconvene, at which time Officer Erickson would have had to be traveling from St. Louis County or already arrived in Minneapolis, suggests a possibility that delay was the basis for requesting the hearing. Given the myriad possible reasons why no one on Lakoskey's behalf notified the ALJ, Counsel or Officer Erickson before then that there was no need to reconvene the hearing, it is inappropriate to conclude that delay was the sole reason for requesting the reconvening.

R.C.L.